APPELLANT PRO SE:

CURTIS T. ELLISON
Michigan City, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CURTIS TYRONE ELLISON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0601-CV-26
	)	
CHARLES H. GRADDICK,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D02-0407-CT-83

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Curtis Ellison, an inmate at the Indiana State Prison in Michigan City, filed a lawsuit against attorney Charles Graddick alleging breach of contract and malpractice. The trial court denied Ellison's request for appointment of counsel and *sua sponte* dismissed Ellison's complaint as meritless. Ellison now appeals, raising the following issues: 1) whether the trial court properly refused to appoint counsel to represent him; and 2) whether the trial court properly dismissed his complaint as meritless.[1] Concluding that the trial court did not abuse its discretion when it denied Ellison's motion for appointment of counsel, but that it erred when it *sua sponte* dismissed Ellison's complaint, we affirm in part and reverse in part.

Facts and Procedural History

Ellison was convicted in 1998 of murder and two counts of attempted murder following a jury trial and was sentenced to sixty-five years incarceration. On direct appeal of his conviction and sentence, this court affirmed, holding that the prosecutor had not committed fundamental error by referring to Ellison as a "murderer" during closing argument and that the trial court properly sentenced Ellison. Ellison v. State, 717 N.E.2d 211, 215-16 (Ind. Ct. App. 1999), trans. denied.

In 2000, Ellison retained Graddick to represent him in post-conviction relief proceedings. Ellison paid Graddick a total of $5,000 to undertake this representation. Graddick prepared and filed a petition for post-conviction relief, and attended the hearing on the post-conviction petition. On September 27, 2002, the post-conviction court denied

[1] Ellison also contends that the offender litigation screening procedure found in Indiana Code chapter 34-58-1 is unconstitutional. Because Ellison's complaint was not dismissed pursuant to this chapter, and because we will not decide constitutional questions when a case can be decided upon other grounds, State v. Brown, 840 N.E.2d 411, 414 (Ind. Ct. App. 2006), we do not address this issue.

Ellison's petition for post-conviction relief. The order notes that Ellison presented as evidence only his own testimony and two diagrams he prepared. "No other witnesses, nor any documents, transcripts, or records were offered into evidence." Appellant's Appendix at 163. Also effective September 27, 2002, Graddick was suspended from the practice of law for ninety days for professional misconduct unrelated to this matter. See Matter of Graddick, 769 N.E.2d 589 (Ind. 2002), modified by 772 N.E.2d 403 (Ind. 2002). Graddick was therefore unable to appeal the denial of post-conviction relief on Ellison's behalf. On October 20, 2002, Ellison wrote Graddick a letter requesting a refund of $4,000 of the fee he had previously paid, claiming that it was unearned. Graddick never responded to Ellison's request.

Ellison thereafter filed a motion to correct errors in the post-conviction proceedings, alleging that he received ineffective assistance of post-conviction counsel. A hearing on Ellison's motion to correct errors was begun on January 28, 2003, and scheduled to continue on September 18, 2003. In the interim, this court decided the case of Bahm v. State, 789 N.E.2d 50, 62 (Ind. Ct. App. 2003), trans. denied, which held, in part, that the failure of post-conviction counsel to present any evidence at a hearing on a petition for post-conviction relief deprived the petitioner of a fair hearing and amounted to ineffective assistance. Ellison filed a "Verified Motion Based on New Authority for Motion to Correct Error to be Granted and Hearing to be Designated as a Post-Conviction Relief Evidentiary Hearing," citing Bahm. The trial court granted Ellison's motion to correct errors, vacated the earlier denial of his petition for post-conviction relief and reinstated the petition, and designated the

September 18, 2003, hearing as a post-conviction relief hearing.[2]

Effective July 1, 2004, the Indiana legislature enacted Indiana Code chapter 34-58-1, pursuant to which a screening procedure for inmate litigation was instituted. Ellison filed a civil complaint against Graddick on July 7, 2004, alleging legal malpractice and breach of contract. Ellison also filed a motion seeking leave to proceed as an indigent and for appointment of counsel. The trial court directed the clerk to docket Ellison's complaint but take no further action until the court completed the screening procedure mandated by Indiana Code chapter 34-58-1. On September 1, 2004, the trial court entered the following order:

> [Ellison], an inmate at the Indiana State Prison, mailed a Proposed Complaint and Summons to the Clerk's Office for filing. Under I.C. 34-10-1-1,[3] this Court now reviews these pleadings and finds as follows:
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> I
>
> 1. The bulk of [Ellison's] Complaint, (paragraphs 1 thru 4, 7 thru 20, and 23 thru 27), could be a basis for an action for breach of contract and/or malpractice.
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> 2. The other paragraphs fail to state a cognizable claim that this Court has jurisdiction over.
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> 3. [Ellison's] prayer for relief requests certain types of relief that he is not entitled to under the allegations of his Complaint, however, he does allege compensatory and punitive damages.
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> Therefore, the Clerk is directed to file the Complaint and Summons.
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> II
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> [Ellison] has also requested the Court for authorization to proceed as an indigent person. Under current case and statutory law, the Court must

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[2] It appears that the petition for post-conviction relief was ultimately denied and the denial was affirmed on appeal. Ellison v. State, No. 45A05-0409-PC-507 (Ind. Ct. App., May 31, 2005), trans. denied.

[3] The order originally referenced Indiana Code chapter 34-38-1, but the reference was crossed out and "34-10-1-1" was written in above it. Chapter 34-38-1 concerns statutes and laws of Indiana and the Northwest Territories as evidence and is clearly a typographical error. Although the order specifically references only review pursuant to the statute dealing with appointment of counsel for indigent persons in civil actions, it is clear from the substance of section I of the order, as well as the service line ordering service to be made as required by Indiana Code chapter 34-58-1, that the trial court was also memorializing therein its review of Ellison's complaint pursuant to chapter 34-58-1.

> determine whether or not [Ellison] is indigent and also if his claims set out a "colorable *bona fide* dispute over issues warranting the expense of Counsel." [Ellison's] affidavit establishes his indigency, however, indigency is not enough. His Complaint is for compensatory and punitive damages alleging as a minimum breach of contract and malpractice and thus is a case that has the ability to fund Counsel.
>
> [Ellison's] affidavit is silent on what he has done to obtain Counsel to prosecute this matter on a contingent fee basis. The Court, therefore, directs the Clerk to tax the filing fee and Court costs at this time and orders [Ellison] to supplement his affidavit with additional information as to his ability to obtain Counsel on a contingent fee basis. [Ellison] has forty-five (45) days to comply with this Order.
>
> ALL ORDERED, ADJUDGED AND DECREED THIS 1ST DAY OF SEPTEMBER, 2004.
>
> /s/ William E. Davis
> Lake Superior Court, Civil Division
> Room Number Two
>
> NOTICE TR72d and SERVICE AS SET OUT IN I.C. 34-58-1

Appellant's App. at 27-28 (emphasis in original) (citation omitted).

On October 26, 2004, Ellison filed a Motion for Either Extension of Time or Compliance to Court's Order, detailing his efforts to obtain counsel. The trial court granted Ellison an additional forty-five days in which to comply with the court's previous order. On December 5, 2004, Ellison filed another Motion for Either Extension of Time or Compliance to Court's Order. No order was apparently entered with regard to this motion. In January, April, and October of 2005, Ellison filed "Renewed Motions for Appointment of Counsel." No order was apparently entered with regard to the January or April motions, but on November 1, 2005, the trial court entered the following order:

> [Ellison] submits his renewed Motion for the Appointment of Counsel. The Court has reviewed the Motion and renewed Motion, as well as, [Ellison's] pleadings, the statutory and case law, and now DENIES his Motion. The Statutes, I.C. 34-10-1-1 and 34-10-1-2, and recent case law requires [sic] the Court to review [Ellison's] claim and determine whether he has sufficient means to prosecute the action, whther he is indigent, and whether an attorney

should be mandated by the Court to represent [Ellison].

Here it is obvious that [Ellison] is in jail and without any assets. Further, it appears that the subject of his claim, i.e., breach of contract and attorney malpractice is complicated enough to discourage him from representing himself. Also he has sought an attorney to represent him for pay since this is a potential fee generating case. Moreover, the 1st District Pro Bono Commission has tried to recruit a volunteer attorney to help him prop bono, but has failed to accomplish this goal . . . . Finally, the Court has considered using its Trial Rule powers to mandate funds to pay for [Ellison's] representation.

[Ellison's] claim for breach of contract and malpractice does not appear to have sufficient merit to justify the Court to exercise mandate powers. [Ellison's] malpractice claim involved the handling of his first Post Conviction Relief Petition by Attorney Graddick. To prevail in this malpractice action, [Ellison] would have to show that the malpractice jeopardized his Post Conviction Relief action, and/or that he breached the attorney client contract with [Ellison]. However, the record reveals that Attorney Graddick was replaced as [Ellison's] Counsel after 27 months and 2 hearings. The Petition was eventually heard again on Successor Counsel's Petition and denied by the Trial Court as was the appeal of his Post Conviction Relief Petitions. In the Trial Court hearing and Appeal [Ellison] was represented by Counsel at public expense. Thus, resulting in no financial loss to [Ellison].

The Court therefore DENIES [Ellison's] request for Counsel at public expense, and further finds his claim has no merit and therefore, dismisses his Complaint in its entirety. Judgment for Defendant.

Appellant's App. at 6-7. Ellison now appeals the trial court's denial of his motion for appointment of counsel and dismissal of his complaint.

Discussion and Decision[4]

I. Appointment of Counsel

Indiana Code chapter 34-10-1 provides that an indigent person without sufficient means to prosecute an action may apply to the court for leave to proceed as an indigent

[4] We note that Graddick has not filed an Appellee's Brief in this case. When the appellee fails to submit a brief, we will not undertake the burden of developing arguments for the appellee. State Farm Ins. v. Freeman, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). We apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the lower court if the appellant can establish

person. Ind. Code § 34-10-1-1. If the court is satisfied that the applicant does not have sufficient means to prosecute the action, the court "shall admit the applicant to prosecute . . . as an indigent person; and may, under exceptional circumstances, assign an attorney to defend or prosecute the cause." Ind. Code § 34-10-1-2(b). In determining whether "exceptional circumstances" exist, the court may consider the likelihood of the applicant prevailing on the merits of his claim and the applicant's ability to investigate and present his claims without an attorney, "given the type and complexity of the facts and legal issues in the action." Ind. Code § 34-10-1-2(c). However, the court "shall deny an application" if the applicant failed to make a diligent effort to obtain an attorney before filing the application or if the applicant is unlikely to prevail on his claim. Ind. Code § 34-10-1-2(d).

In ruling on an application for appointed counsel in a civil case, the trial court must determine whether the applicant is indigent, considering his financial resources, and whether the applicant, even if indigent, nonetheless has means to prosecute or defend the case. Sholes v. Sholes, 760 N.E.2d 156, 157 (Ind. 2001). Both determinations – indigency and sufficient means – are left to the trial court's discretion. Id. at 161 n.3. Prior to March 26, 2002, if the trial court determined an applicant was indigent and without sufficient means to prosecute his claim, appointment of counsel was mandatory. See id. at 160. The statute was amended effective March 26, 2002, however, to make appointment of counsel discretionary and even then, only under "extraordinary circumstances."

The trial court here considered all of the factors mandated by statute in ruling on

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prima facie error. Id. "Prima facie" is defined in this context as "at first sight, on first appearance, or on the face of it." AmRhein v. Eden, 779 N.E.2d 1197, 1205 (Ind. Ct. App. 2002).

Ellison's motion for appointment of counsel. The court considered whether Ellison was indigent, whether he had sufficient means to otherwise prosecute his claim, the efforts he made to obtain counsel, and the likelihood of success on the merits of his claim. Ultimately, the trial court determined that there were no "extraordinary circumstances" justifying appointment of counsel at public expense in this case. The determination is discretionary, and we cannot say that the trial court's decision was an abuse of its discretion. We therefore affirm that part of the trial court's order denying Ellison's motion for appointment of counsel.

II. Dismissal of Complaint

Ellison also contends that the trial court erred in dismissing his complaint. We agree.

Indiana Code chapter 34-58-1 provides a screening mechanism for offender litigation. An "offender" is defined for purposes of this chapter as "a person who is committed to the department of correction or incarcerated in a jail." Ind. Code § 34-6-2-89(b). When the court receives a complaint filed by an offender, the court is to docket the case but take no further action until the court has conducted the required review. Ind. Code § 34-58-1-1. The court is to review the complaint to determine whether the claim or claims made therein may proceed. Ind. Code § 34-58-1-2(a). A claim may not proceed if the court determines it "is frivolous; is not a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from liability for such relief." Id. If the court determines that a claim may not proceed, it must enter an order explaining why the claim may not proceed and stating whether there remain any claims in the complaint that may proceed. Ind. Code § 34-

58-1-3.[5]

When the court received Ellison's complaint, it directed the clerk to docket the case and take no further action until the court completed the screening procedure of Indiana Code chapter 34-58-1. Appellant's App. at 26. The court thereafter entered an order in which it determined that certain paragraphs of Ellison's proposed complaint "could be a basis for an action for breach of contract and/or malpractice." Id. at 27. The court therefore directed the clerk to file the complaint. Id. With that, the trial court determined that Ellison's complaint was neither frivolous nor a claim upon which relief could not be granted, and the screening procedure was completed. In ruling on Ellison's subsequent motion for appointment of counsel, however, the trial court determined that the complaint lacked merit and ordered that it be dismissed. There was no motion to dismiss before the court, and in fact, other than Ellison's motions for appointment of counsel, the procedural posture of the case had not changed since the trial court ordered the complaint to be filed.

It is true the trial court could consider the likelihood of success in determining whether Ellison demonstrated "extraordinary circumstances" entitling him to appointment of counsel at public expense. See Ind. Code § 34-10-1-2(c)(1). However, the statute allowing the trial court to deny an application for appointment of counsel if the applicant is unlikely to prevail on the merits does not also allow the trial court to dismiss the complaint for that reason. Although a trial court can *sua sponte* enter a dismissal if it lacks jurisdiction or if

[5] We note that Indiana Code section 34-58-2-1 provides that "[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2, the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury." There is no evidence that this provision is applicable in this case.

dismissal is otherwise authorized by statute or rule, we can find no authority to support the trial court's *sua sponte* dismissal of Ellison's complaint for failure to state a claim. See Alleshouse v. State Student Assistance Comm'n, 565 N.E.2d 340, 344 (Ind. Ct. App. 1991) (holding that *sua sponte* dismissal was in error "since it was not based upon lack of jurisdiction or otherwise authorized by statute or the rules of procedure"); see also Warrick County v. Weber, 714 N.E.2d 685, 687 (Ind. Ct. App. 1999) (noting that "lack of subject matter jurisdiction can be raised at any time; and, if the parties do not question it, the trial court or Court of Appeals is required to consider the issue *sua sponte*); State v. Hardman, 542 N.E.2d 230, 231 (Ind. Ct. App. 1989), trans. denied (stating that there is authority for *sua sponte* dismissal of a civil action in Indiana Trial Rule 41(E), which states that "[w]henever there has been a failure to comply with [the trial] rules or when no action has been taken . . . for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case."). Whether an offender's complaint should be filed pursuant to Indiana Code chapter 34-58-1 and whether an offender is entitled to appointment of counsel pursuant to Indiana Code chapter 34-10-1 are two independent determinations. Having determined pursuant to the screening procedure that Ellison's proposed complaint should be filed, the trial court erred when it subsequently *sua sponte* dismissed the complaint for lack of merit upon determining that Ellison was not entitled to appointed counsel. We therefore reverse that part of the trial court's order dismissing Ellison's complaint.

Conclusion

The trial court did not abuse its discretion in denying Ellison's motion for appointment

of counsel. However, the trial court did commit error in *sua sponte* dismissing Ellison's complaint for lack of merit. Accordingly, that part of the trial court's order declining to appoint counsel at public expense is affirmed and that part dismissing Ellison's complaint is reversed. This cause is remanded to the trial court for further proceedings.

Affirmed in part, reversed in part, and remanded.

BARNES, J. concurs.

SULLIVAN, J., concurs with separate opinion.

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	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0601-CV-26
	)	
CHARLES H. GRADDICK,	)	
	)	
Appellee-Defendant.	)	

SULLIVAN, Judge, concurring

I concur as to Part I but do so with the observation that the trial court's discretionary denial of Ellison's petition for appointment of counsel was justified because the court concluded that Ellison's "claim for breach of contract and malpractice does not appear to have sufficient merit . . . ."[6]

I do not believe that such denial could properly be based upon a failure of Ellison to establish indigency, for he did so. Furthermore, the denial could not appropriately be premised upon his failure to seek to retain private counsel upon a contingent fee basis because he did attempt to do so and was unsuccessful.[7]

[6] Although the "meritless" conclusion of the court was stated in conjunction with the court's determination not to mandate funds to pay for counsel, I would infer a generic or generalized conclusion as to lack of merit insofar as appointment of pauper counsel is concerned. As set forth in Part II of our decision herein, the "meritless" conclusion does not apply to whether the court properly dismissed the complaint.

[7] Efforts by the District Pro Bono Commission to recruit a volunteer to represent Ellison were also

I fully concur as to Part II.[8]

unsuccessful.

[8] In doing so, I recognize that a plausible argument might be made that the "no merit" conclusion reached at the appointment-of-counsel stage might well have justified dismissal of the complaint at the screening procedure stage.